

D.T.E. 97-116-F

Complaint of MCI WorldCom, Inc. against New England Telephone and Telegraph Company  
d/b/a Bell Atlantic-Massachusetts for breach of interconnection terms entered into under  
Sections 251 and 252 of the Telecommunications Act of 1996.

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## I. INTRODUCTION AND PROCEDURAL HISTORY

The issue of reciprocal compensation<sup>1</sup> for telecommunications traffic bound for Internet service providers (“ISP-bound traffic”) has been the subject of numerous orders of both the Department of Telecommunications and Energy (“Department”) and the Federal Communications Commission (“FCC”). We again address the issue in this Order to implement in Massachusetts the requirements contained within the FCC’s recent order<sup>2</sup> and discuss the effect of the FCC’s order on the events that have formed the basis of this proceeding. We begin with a summary of past activities.

### A. The Department’s Orders

On October 21, 1998, the Department ruled that ISP-bound traffic was “local traffic” because it was functionally two separate services, i.e., “two calls”: 1) a local call to an ISP; and 2) an information service provided by an ISP when the ISP connects the caller to the Internet. Complaint of WorldCom Technologies, Inc. (successor in interest to MFS Intelenet Service of Massachusetts, Inc.) against New England Telephone and Telegraph Company d/b/a Bell Atlantic Massachusetts for alleged breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996, D.T.E. 97-116, at 11 (1998)

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<sup>1</sup> Reciprocal compensation is a “calling-party’s-network-pays” regime in which the calling party’s network pays the network serving the called party for transport and termination of certain telecommunications traffic.

<sup>2</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Intercarrier Compensation for ISP-bound Traffic, CC Docket No. 99-68, Order on Remand and Report and Order, FCC 01-131 (rel. April 27, 2001) (“Order on Remand”).

(“D.T.E. 97-116 Order”). Accordingly, the Department concluded that ISP-bound traffic was properly considered local traffic subject to the reciprocal compensation provisions contained in the parties’ interconnection agreements. Id. at 12-13. On February 26, 1999, the FCC declared that telephone traffic bound for ISPs was jurisdictionally mixed and interstate in nature because a substantial portion of that traffic would continue on, as a single communication, to Internet websites often located in other states or countries. Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Declaratory Ruling, Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, Notice of Proposed Rulemaking, FCC 99-38 (rel. February 26, 1999) (“Internet Traffic Order”). The FCC did not explicitly overturn state commissions that had previously determined that such traffic was jurisdictionally local based on a two-call analysis, but did note that decisions resting on other bases such as “state contract law or other legal or equitable considerations” might still be valid until the FCC issued a final rule on the matter. Id. at ¶ 27.

In March of 1999, Verizon, then Bell Atlantic,<sup>3</sup> moved the Department to modify its D.T.E. 97-116 Order in light of the FCC’s ruling. After review, the Department determined that the FCC’s determination had superseded its D.T.E. 97-116 Order by striking down the sole and express basis for the Department’s holding that the parties’ interconnection agreements required reciprocal compensation for terminating ISP-bound traffic. D.T.E. 97-116-C at 21-22 (1999). Accordingly, the Department concluded that the net effect of the FCC’s Internet

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<sup>3</sup> In August 2000, New England Telephone and Telegraph Company d/b/a Bell Atlantic Massachusetts (“Bell Atlantic”) changed its name to Verizon New England, Inc. d/b/a Verizon Massachusetts (“Verizon” or “VZ-MA”).

Traffic Order was to nullify the Department's D.T.E. 97-116 Order. Id. at 25. Without a current effective Department Order requiring Verizon to pay interconnecting carriers for their transport and termination of ISP-bound traffic originating on Verizon's network, the Department noted that no compensation payments for this "non-local" traffic were required. Id. In the absence of a method to segregate local traffic from ISP-bound traffic, the Department approved a 2:1 ratio of terminating to originating traffic, the excess of which Verizon could presume, subject to rebuttal by the submitting carrier, was terminating to an ISP, and, thus, exclude from reciprocal compensation payments. Id. at 28 n.31. The Department concluded that although the parties' interconnection agreements contained no terms or obligations requiring the companies to compensate each other for the transport and termination of ISP-bound traffic, the Department recognized that actual costs were associated with those services and directed the carriers to negotiate a resolution of this issue. Id. at 30. If negotiations did not proceed expeditiously, the Department offered to supply a mediator, and if that failed to produce a result, then to arbitrate the matter. Id. On February 25, 2000, the Department issued an Order, D.T.E. 97-116-D/99-39 (2000), denying on procedural grounds the parties' motions for reconsideration of the D.T.E. 97-116-C Order, and dismissed as moot a related complaint for declaratory relief by Global NAPs, Inc. ("GNAPs"). Shortly thereafter, the United States Court of Appeals for the D.C. Circuit vacated and remanded the FCC's Internet Traffic Order, stating that the FCC failed to explain adequately the basis for its use of an "end to end" analysis within the context of reciprocal compensation. Bell Atlantic Telephone Cos. v. FCC, 206 F.3d 1, 3 (2000).

B. Events Since the D.C. Circuit Court's Remand

In light of the D.C. Circuit Court's action, on April 5, 2000, GNAPs moved the Department to vacate its Orders D.T.E. 97-116-C and D.T.E. 97-116-D/99-39, and to reinstate the Department's Order D.T.E. 97-116. After review, on July 11, 2000, the Department denied GNAPs' motion to vacate and indicated that we would wait for the FCC's action on remand before taking any further action in this docket because, "the Department and the parties will be bound when the FCC acts on remand [and] it is impractical for the Department . . . to career back and forth with alternating decisions on the very issue even now under review by the FCC. The Department determines that stability in the interim . . . is the better course." D.T.E. 97-116-E at 15 (2000). Meanwhile, MCI WorldCom, Inc. ("WorldCom") and GNAPs had filed appeals of the Department's Orders D.T.E. 97-116-C, D.T.E. 97-116-D/99-39, and now D.T.E. 97-116-E, in both state and federal courts.<sup>4</sup>

On April 27, 2001, the FCC released its Order on Remand. In its Order on Remand, the FCC affirmed its conclusion in the Internet Traffic Order that ISP-bound traffic was not subject to reciprocal compensation, but re-examined the analysis it used to reach that conclusion. The FCC determined that ISP-bound traffic was "information access" traffic, a type of telecommunications traffic specifically excluded from the reciprocal compensation obligations contained in 47 U.S.C. § 251(b)(5) by 47 U.S.C. § 251(g). Order on Remand

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<sup>4</sup> Appeals of the Department's Orders in this docket have been consolidated and are currently under review in the United States District Court for the District of Massachusetts in Global NAPs, Inc., et al. v. Verizon New England, Inc., et al., Case Nos. 00-CV-10407 RCL; 00-CV-11513 RCL (D. Mass).



at ¶ 30. However, rather than completely eliminate compensation for this type of traffic, the FCC established a transitional cost recovery mechanism consisting of a series of rate and growth caps over a period of thirty-six months (i.e., the “interim period”) following the effective date of the Order on Remand. Id. at ¶¶ 77-88 (see section III, below, for a more detailed discussion of the Order on Remand).

In response to the FCC’s Order on Remand, on May 23, 2001, the Department requested comments from interested persons in this docket on the effect of the FCC’s order on the issue of reciprocal compensation for ISP-bound traffic in Massachusetts. The Department received comments from the following: Sprint Communications Co. (“Sprint”); RCN-BecoCom, L.L.C. (“RCN-BecoCom”); WorldCom; RNK Telecom (“RNK”); AT&T Communications of New England, Inc. (“AT&T”)<sup>5</sup>; Verizon; and GNAPs. Reply comments were filed by WorldCom; GNAPs; AT&T; Verizon; RNK; and RCN-BecoCom.

I. POSITIONS OF THE PARTIES AND COMMENTERS<sup>6</sup>

A. Competitive Local Exchange Carriers (“CLECs”)

WorldCom and GNAPs argue that the FCC’s Order on Remand requires the Department to vacate, or to agree to the entry of a court order vacating, its Orders D.T.E. 97-

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<sup>5</sup> AT&T submitted comments on behalf of itself and its affiliated companies, Teleport Communications–Boston, Inc., Teleport Communications Group, and ACC National Telecom Corp.

<sup>6</sup> As with the prior Orders in this docket, the Department allowed comments from all service list members. As distinct from parties, non-party commenters have no right to appeal as to matters of law from final Orders issued by the Department. See G.L. c. 25, § 5; G.L. c. 30A, § 1(3); 220 C.M.R. § 1.03.

116-C, D.T.E. 97-116-D/99-39, and D.T.E. 97-116-E, because the FCC's Order on Remand repudiates the FCC's earlier analysis upon which the Department relied (WorldCom Comments at 10, 19-21; GNAPs Reply Comments at 6-7). WorldCom and GNAPs further argue that the FCC's Order on Remand requires the Department to reinstate its earlier Order, D.T.E. 97-116 (WorldCom Comments at 19; GNAPS Reply Comments at 6-7). RCN-BecoCom, RNK, and Sprint argue that the FCC's Order on Remand requires the Department to establish a retroactive compensation scheme for ISP-bound traffic terminated prior to the effective date of the Order on Remand (RCN-BecoCom Comments at 3,6; RNK Comments at 4; Sprint Comments at 4-6). Sprint argues that the retroactive compensation scheme should consist of a true-up by Verizon for CLEC termination of past ISP-bound traffic at contractual reciprocal compensation rates (Sprint Comments at 4-6). RNK argues that the FCC's Order on Remand sets out a recommended course of action for states to follow in establishing a compensation scheme (RNK Comments at 3). Sprint further asserts that the FCC's Order on Remand does not preempt decisions of state commissions regarding compensation for ISP-bound traffic and prevents carriers from opting into other carriers' existing agreements with regard to ISP-bound traffic (Sprint Comments at 3). GNAPs argues that the FCC's Order on Remand has no effect at all on the matters before the Department in this docket (GNAPs Comments at 2).

Sprint and GNAPs argue that if existing interconnection agreements have a "change in law" clause, those carriers will be required to adhere to the FCC's interim compensation scheme (Sprint Comments at 3; GNAPs Comments at 2-3). GNAPS, Sprint, and WorldCom assert that when existing interconnection agreements expire, the FCC's compensation regime

takes effect (GNAPs Comments at 2; Sprint Comments at 3; WorldCom Comments at 3).

Sprint, RCN-BecoCom, WorldCom, RNK, and AT&T agree that the Department no longer has the authority to address the issue of compensation for ISP-bound traffic on a prospective basis (Sprint Comments at 4; RCN-BecoCom Comments at 4; WorldCom Comments at 4, 22-23; RNK Reply Comments at 9; AT&T Comments at 2-3). RCN-BecoCom suggests that the Department should explain how the federal regime will apply in Massachusetts if the parties cannot agree to terms (RCN-BecoCom Reply Comments at 3). AT&T suggests that because the Order on Remand is being appealed and may never take effect, the Department should take no further action, or if action be taken, to simply terminate this proceeding (AT&T Reply Comments at 5-6).

RNK and AT&T argue that the Department has never undertaken an investigation into the merits of the contract dispute between the original parties to this case (RNK Reply Comments at 7; AT&T Comments at 3). WorldCom and GNAPs assert that the Department correctly undertook such a contract analysis in its D.T.E. 97-116 Order, a decision which must now be reinstated (WorldCom Comments at 2, 19; WorldCom Reply Comments at 4; GNAPs Reply Comments at 6). WorldCom asserts that the FCC's Order on Remand reaffirmed that whether reciprocal compensation is owed under existing agreements is determined by the terms of the agreement as a matter of contract law and not by examining the minimum requirements of federal law (WorldCom Comments at 11). GNAPs suggests that the Department should encourage the parties to settle their disputes about existing contracts, including encouraging compromise of respective contractual rights, and provide guidance as to a reasonable settlement

figure (GNAPs Comments at 4). AT&T argues that, because its interconnection agreement with Verizon was not before the Department in this proceeding, if the Department makes any opinion or judgment regarding its or its affiliates' interconnection agreements, the Department would be acting in violation of due process rights (AT&T Reply Comments at 4).

B. Verizon

Verizon argues that the FCC's Order on Remand removes any controversy regarding the Department's holdings in its earlier Orders, D.T.E. 97-116-C, D.T.E. 97-116-D/99-39, and D.T.E. 97-116-E, and lays to rest all CLEC claims that Verizon is now, has ever been, or is in the future obligated to pay reciprocal compensation for ISP-bound traffic (VZ-MA Comments at 1). Verizon argues that the Order on Remand reaffirmed the FCC's earlier conclusion that ISP-bound traffic is jurisdictionally interstate (id. at 5). Verizon further argues that the Order on Remand concluded that compensation for such traffic is not governed by 47 U.S.C. § 251(b)(5) and that the FCC has exclusive jurisdiction to establish rules governing such compensation (id.). Further, Verizon argues that to the extent that CLECs are eligible for compensation under the FCC's interim compensation scheme, a 3:1 traffic ratio presumption (rather than the Department's 2:1 presumption) would determine whether traffic was ISP-bound and subject to the interim scheme (id. at 7 n.8). Verizon asserts that while the FCC's interim scheme does not alter existing contractual obligations (except to the extent parties may invoke "change of law" provisions), in Massachusetts, Verizon has no contractual obligations to pay reciprocal compensation for ISP-bound traffic (id. at 8 n.9). Verizon argues that the CLECs' contention that the Department never addressed Verizon's contractual obligations, and therefore

the CLECs can still assert claims that Verizon agreed in its existing contracts to pay reciprocal compensation for ISP-bound traffic, misstates that Department's ruling in the D.T.E. 97-116 Order (VZ-MA Reply Comments at 6). In D.T.E. 97-116-C, Verizon argues, the Department unquestionably ruled that the provisions of the WorldCom contract providing for payment of reciprocal compensation for "local" traffic did not apply to interstate ISP-bound traffic (id.). Verizon asserts that any claims which rested on a "different basis for such payments" were never brought forward by CLECs (id. at 7-8).

In addition, Verizon argues that when a new carrier enters the market or expands into a market it previously had not served, the Order on Remand requires that such carriers exchange ISP-bound traffic on a "bill and keep"<sup>7</sup> basis during the interim period (VZ-MA Comments at 9). Verizon asserts that the Department now has no authority to address the issue of reciprocal compensation for ISP-bound traffic; therefore, the Department should reaffirm that federal law is dispositive of the reciprocal compensation provisions in the parties' interconnection agreements, and should terminate this proceeding without taking any further action (id. at 8; VZ-MA Reply Comments at 1). Verizon argues that the Department cannot, as some CLECs suggest, establish a retroactive compensation scheme for ISP-bound traffic (VZ-MA Reply Comments at 8-9). To do so, Verizon argues, would not only improperly reward those carriers who did not proceed in the manner suggested by the Department in the

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<sup>7</sup> The FCC defines "bill and keep" as an arrangement in which neither of two interconnecting networks charges the other for terminating traffic that originates on the other network. Order on Remand at ¶ 2 n.6. Instead, each network recovers from its own end-users the cost of both originating traffic that it delivers to the other network and terminating traffic that it receives from the other network. Id.

D.T.E. 97-116-C Order (i.e., negotiated resolution of the issue), but also be at odds with the Order on Remand, which preempts state commissions from exercising any further authority over this issue (id. at 10).

### III. ANALYSIS AND FINDINGS

Now that the FCC has issued its Order on Remand and we have received comments from parties and other interested persons, in this Order we seek to analyze the effect of the FCC's Order on Remand on: 1) the Department's D.T.E. 97-116-C Order, and by extension the D.T.E. 97-116-D/99-39 and D.T.E. 97-116-E Orders; 2) the existing interconnection agreements that have formed the basis of this proceeding; and 3) future interconnection agreements entered into in Massachusetts during the "interim period" established by the FCC in its Order on Remand.

#### A. Effect of the *Order on Remand* on the Department's D.T.E. 97-116-C, D.T.E. 97-116-D/99-39, and D.T.E. 97-116-E Orders

We will first discuss the effect that the FCC's Order on Remand has on the Department's prior Orders in this docket, D.T.E. 97-116-C, and by extension D.T.E. 97-116-D/99-39 and D.T.E. 97-116-E. Several commenters argue that, as a result of the Order on Remand, the Department is now compelled to vacate D.T.E. 97-116-C, D.T.E. 97-116-D/99-39 and D.T.E. 97-116-E, and to reinstate its earlier Order, D.T.E. 97-116, or alternatively, to ask the Court in which those Orders are under review to do so. We disagree. For the reasons discussed below, we conclude that the FCC's Order on Remand does not invalidate the Department's prior Orders D.T.E. 97-116-C, D.T.E. 97-116-D/99-39, and D.T.E. 97-116-E.

We also conclude that the Order on Remand does not compel the Department to otherwise modify or change the conclusions reached in those Orders.

The FCC's Order on Remand does not supersede or nullify the Department's prior Orders, D.T.E. 97-116-C, D.T.E. 97-116-D/99-39, and D.T.E. 97-116-E. The Order on Remand states that "[t]his Order does not preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here." Order on Remand at ¶ 82. Therefore, by the FCC's clear directive, the Department's Orders are not preempted by the FCC's action to the extent the Department's Orders concern compensation for ISP-bound traffic prior to June 14, 2001, the effective date of the Order on Remand<sup>8</sup> (see sections III.B. and III.C., below, for a discussion on the validity of the Department's Orders post-June 14, 2001).

Some commenters argue that, even if the Order on Remand does not directly preempt our Orders on this subject, the analysis used by the FCC in the Order on Remand to reach its conclusion that ISP-bound traffic is not subject to reciprocal compensation is now at odds with the analysis used by the Department in reaching the same conclusion in its Orders; and, because the analysis used by the Department is now unsupported, the Department must vacate its Orders on the subject. However, as explained further below, we conclude that the analysis used in the Order on Remand is *not* at odds with or unsupported by the conclusions reached in

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<sup>8</sup> According to the Order on Remand at ¶ 112, the effective date of the Order on Remand and the rule revisions therein is thirty days from its date of publication. The Order on Remand was published in the Federal Register on May 15, 2001, therefore, its effective date is June 14, 2001. Contrary to some commenters' assertions, the FCC's Order on Remand is currently "in effect."

the Department's Orders, and, therefore, there is no conflict between the two, and the Department's Orders may stand without modification.

In the Internet Traffic Order, the FCC declared that ISP-bound traffic was not subject to the reciprocal compensation obligations in 47 U.S.C. § 251(b)(5) on the basis that it was primarily interstate traffic.<sup>9</sup> In the Order on Remand, the FCC affirmed its conclusion that ISP-bound traffic is not subject to reciprocal compensation obligations,<sup>10</sup> and in re-examining that conclusion, the FCC determined that ISP-bound traffic is exempted from 47 U.S.C. § 251(b)(5) as "information access," a form of telecommunications specifically exempted by 47 U.S.C. § 251(g).<sup>11</sup> But whether the FCC characterizes ISP-bound traffic as "interstate access" in the Internet Traffic Order, or "information access" in the Order on Remand is not, contrary to some commenters' positions, dispositive as to the continued validity of the D.T.E. 97-116-C, D.T.E. 97-116-D/99-39, and D.T.E. 97-116-E Orders. What is determinative is that the FCC does not characterize ISP-bound traffic as "local traffic." It is only the designation of "local traffic" that permits the reciprocal compensation provisions of the parties' interconnection agreements to apply.<sup>12</sup> Neither the FCC in its Order on Remand or its Internet Traffic Order,

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<sup>9</sup> Internet Traffic Order at ¶ 12.

<sup>10</sup> Order on Remand at ¶ 3.

<sup>11</sup> Id. at ¶ 30.

<sup>12</sup> Section 5.8.1 of the Bell Atlantic–MCI WorldCom interconnection agreement states, "Reciprocal compensation only applies to the transport and termination of *Local Traffic* billable by [Verizon or WorldCom] which a Telephone Exchange Service Customer originates on [Verizon's or WorldCom's] network for termination on the other Party's network . . . ." (Emphasis added).



nor the Department in its D.T.E. 97-116-C, D.T.E. 97-116-D/99-39, and D.T.E. 97-116-E Orders, have characterized ISP-bound traffic as local traffic. Therefore, we find there is no conflict between the analysis the FCC used to conclude that ISP-bound traffic is not subject to reciprocal compensation in the FCC's Order on Remand (notwithstanding other differences between the FCC's Order on Remand and the Internet Traffic Order) and the Department's holding in its Orders that ISP-bound traffic is not subject to reciprocal compensation pursuant to the parties' interconnection agreements.

Because the Order on Remand has not preempted or invalidated the Department's Orders, the Department need not vacate its D.T.E. 97-116-C, D.T.E. 97-116-D/99-39, and D.T.E. 97-116-E Orders, and need not reinstate its D.T.E. 97-116 Order. The Department's D.T.E. 97-116-C, D.T.E. 97-116-D/99-39, and D.T.E. 97-116-E Orders remain valid and in effect from their respective issuance dates. Therefore, the provisions contained within D.T.E. 97-116-C (e.g., the 2:1 rebuttable proxy, the emphasis on carrier negotiation, the Department's policy statement on efficient entry, etc.) can coexist with the FCC's Order on Remand without the need for the Department to alter or otherwise modify any findings within those Orders.

#### B. Existing Interconnection Agreements

We have concluded that the D.T.E. 97-116-C, D.T.E. 97-116-D/99-39, and D.T.E. 97-116-E Orders remain valid final Orders by the Department; that there is no conflict between the conclusions reached within the Order on Remand and the Department's Orders; and that no modification of the Department's Orders is required. We will now discuss how the FCC's Order on Remand reconciles with the Department's Orders concerning the parties' existing

interconnection agreements, which form the basis for this proceeding. Due to the complexities of the FCC's Order on Remand, this is not an easy task, as exhibited by the widely divergent interpretations in the various responses to our request for comments (see section II, above). However, we can reach certain conclusions.

First, in addition to the Order on Remand not preempting existing state commission decisions that concern ISP-bound traffic before the effective date of the Order on Remand, almost all of the commenters have pointed out that the FCC states that the interim compensation scheme established in the Order on Remand does not alter existing contractual obligations between carriers, except to the extent provided by change of law provisions contained within individual interconnection agreements. Order on Remand at ¶ 82.<sup>13</sup> However, by virtue of the continued validity of the D.T.E. 97-116-C, D.T.E. 97-116-D/99-39, and D.T.E. 97-116-E Orders, Verizon is not governed by a Department Order which establishes obligations to pay compensation for the transport and termination of ISP-bound traffic. In D.T.E. 97-116-C at 27-28, the Department stated, “[A]s far as reciprocal compensation payments not made to MCI WorldCom or other CLECs as of February 26, 1999 [the date of the FCC’s Internet Traffic Order] are concerned, no currently effective Department order categorically requires Bell Atlantic to pay, in some way, for handling CLECs’ ISP-bound traffic.” (Footnote omitted). Verizon remains obligated, however, under the contractual terms of the existing interconnection

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<sup>13</sup> One commenter suggested that the proper role of the Department on a going-forward basis is as interpreter of contractual change of law provisions (GNAPs Comments at 3). We agree that the effect of change of law provisions is best interpreted on a case by case basis.

agreements it has negotiated with certain carriers, pursuant to the Department's directives in the D.T.E. 97-116-C Order.<sup>14</sup> In sum, this means that under the requirements of the Order on Remand, for the terms of existing interconnection agreements, Verizon must continue payments to those carriers with whom Verizon is contractually obligated to compensate for termination of ISP-bound traffic (e.g., Level 3 and PaeTec); and, that Verizon is not required by the Order on Remand or the Department's Orders to unilaterally commence reciprocal compensation payments to those carriers with whom Verizon is not currently obligated by the Department's Orders to do so.<sup>15</sup>

Second, carriers should note that the Order on Remand at ¶ 82 states, "[a]s of the date this Order is published in the Federal Register [May 15, 2001], carriers may no longer invoke section 252(i) to opt into an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic." Therefore, since May 15, 2001, carriers in Massachusetts

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<sup>14</sup> In October and November 1999, the Department approved amendments to interconnection agreements that Verizon negotiated with Level 3 Communications, Inc. ("Level 3") and PaeTec Communications, Inc. ("PaeTec"), regarding a class of traffic called "compensable Internet traffic."

<sup>15</sup> However, Verizon has indicated in its reply comments that on May 14, 2001, Verizon made an offer to all CLECs in Massachusetts with which it has existing interconnection agreements, to exchange section 251(b)(5) traffic at the interim rates for ISP-bound traffic set by the FCC in the Order on Remand beginning on the effective date of the Order (VZ-MA Reply Comments at 11). Verizon did not indicate which CLECs, if any, have accepted Verizon's offer. If accepted, such a change would constitute negotiated amendments to existing agreements and would require Department approval.

no longer have had the choice to opt-in to the provisions relating to compensation for ISP-bound traffic in other carriers' existing interconnection agreements.

Third, the Order on Remand limits the Department's participation in parties' actions with regard to interconnection agreements on a going-forward basis. Carriers remain free to negotiate terms with Verizon related to the costs associated with termination of ISP-bound traffic for the terms of their existing or expired interconnection agreements. As we indicated in the D.T.E. 97-116-C Order:

[W]e expect carriers to begin the voluntary negotiation process provided in section 252 of the 1996 Act, in order to establish, insofar as may be warranted, an inter-carrier compensation mechanism that would apply to compensation for all ISP-bound traffic that was not disbursed as of February 26, 1999, as well as all later-occurring ISP-bound traffic. If need be, we would be willing to provide a Department mediator to facilitate agreement . . . [or] the Department can arbitrate the matter under section 252(b).

D.T.E. 97-116-C at 30. The Department also stated, "MCI WorldCom may choose to renew its complaint [with the Department] upon some claim that Massachusetts contract law 'or some other legal or equitable considerations' give rise to mutual obligations on its and Bell Atlantic's parts to pay reciprocal compensation for ISP-bound traffic, even despite the FCC's jurisdictional pronouncement." Id. at 27 (footnote omitted). However, although the D.T.E. 97-116-C Order remains a valid and effective Order, and thus, the Department's offer to further address this issue if required to do so, still stands, the FCC's Order on Remand acts to limit the extent to which the Department may become involved in this issue. The Order on Remand states, "Because we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, state commissions will no

longer have authority to address this issue.” We read this provision in conjunction with the Department’s Orders as limiting the Department from establishing any compensation mechanism for ISP-bound traffic for the period after the effective date of the Order on Remand [June 14, 2001]; but not limiting the Department from its mediation/arbitration offer for “first generation” interconnection agreements that have expired before June 14, 2001, or existing interconnection agreements that expire after the effective date of the Order on Remand.<sup>16</sup> We note, however, that any claims for compensation for ISP-bound traffic pursuant to these interconnection agreements *must* be based on something other than the definition of local traffic contained in these agreements.

C. Interconnection Agreements Entered Into During the FCC’s Interim Period

Because the FCC has indicated that the interim compensation scheme established in its Order on Remand does not apply to existing contractual arrangements, some commenters have suggested that the interim compensation scheme established in the Order on Remand takes effect when existing interconnection agreements expire and are renegotiated during the FCC’s “interim period” (*i.e.*, the thirty-six month period following the effective date of the Order on Remand). We disagree. For the reasons discussed below, we conclude that the Department’s policy relating to compensation for ISP-bound traffic described in the D.T.E. 97-116-C Order

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<sup>16</sup> Although the Department’s offer of mediation or arbitration to assist carriers in developing a cost recovery mechanism for ISP-bound traffic is still viable to the extent described above, so is the Department’s expectation that a process of negotiations between carriers, driven by market forces, is the more preferable route for carriers to take to resolve this issue. D.T.E. 97-116-C at 27-31; D.T.E. 97-116-D at 19. The Department’s offer does not include a re-determination of whether or not reciprocal compensation provisions apply to ISP-bound traffic.

prevails throughout the FCC's interim period (subject to the FCC's "mirroring rule," discussed below), unless an alternative compensation arrangement is voluntarily negotiated and agreed upon by the parties. As with existing interconnection agreements, agreements entered into during the FCC's interim period remain subject to the Department's 2:1 rebuttable traffic ratio presumption established in D.T.E. 97-116-C at 28 n.31 (rather than the 3:1 presumption established in the FCC's Order on Remand).

In the Order on Remand at ¶ 80, the FCC stated:

[B]ecause the rates set forth above are *caps* on intercarrier compensation, they have no effect to the extent that states have ordered LECs to exchange ISP-bound traffic either at rates below the caps we adopt here or on a bill and keep basis (or otherwise have not required payment of compensation for this type of traffic).

(Emphasis in original). In D.T.E. 97-116-C at 27-31 and n.31, the Department ordered that payment of reciprocal compensation was not required for ISP-bound traffic, and defined ISP-bound traffic as traffic exceeding a 2:1 ratio of terminating to originating traffic. Therefore, pursuant to the FCC's clear directive, because we have not required payment of compensation for this type of traffic, the interim rates set forth in the Order on Remand have no effect in Massachusetts, and the Department's policy prevails for both existing and re-negotiated interconnection agreements throughout the interim period. The FCC pointed out that the purpose of its interim compensation scheme developed in the Order on Remand was to provide a transition toward bill and keep, or some other cost recovery mechanism to be developed in

the FCC's Unified Intercarrier Compensation NPRM proceeding,<sup>17</sup> and no such transition is needed for carriers already exchanging ISP-bound traffic at rates below the caps (as in Massachusetts). See Order on Remand at ¶ 80. At the end of the interim period, carriers in Massachusetts will immediately institute bill and keep, or whatever alternative intercarrier compensation regime the FCC has established in its ongoing companion proceeding.

In addition, although we have stated above that the Department's regime for ISP-bound traffic remains in effect and still governs Verizon's obligations under interconnection agreements in Massachusetts re-negotiated during the FCC's interim period, the FCC's Order on Remand imposes additional requirements on incumbent LECs, such as Verizon. One of these requirements is the "mirroring rule," established by the FCC in the Order on Remand at ¶ 89, to ensure that incumbent LECs will pay the same rates for ISP-bound traffic that they receive for section 251(b)(5) traffic.<sup>18</sup> The FCC stated:

The rate caps for ISP-bound traffic that we adopt here apply, therefore, *only* if an incumbent LEC offers to exchange all traffic subject to section 251(b)(5) at the same rate. . . . Similarly, if an ILEC wishes to continue to exchange ISP-bound traffic on a bill and

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<sup>17</sup> Developing a Unified Intercarrier Compensation Regime, CC Docket 01-92, Notice of Proposed Rulemaking, FCC 01-132 (rel. April 27, 2001) ("Unified Intercarrier Compensation NPRM"). The FCC has indicated that its "interim period" will last for thirty-six months or until further Commission action, whichever is later. Order on Remand at ¶ 8.

<sup>18</sup> The FCC defines section 251(b)(5) traffic as telecommunications traffic between a LEC and a telecommunications carrier other than a CMRS provider that is not interstate or intrastate access traffic delivered to an IXC or an information service provider, and telecommunications traffic between a LEC and a CMRS provider that originates and terminates within the same MTA. Order on Remand at ¶ 89 n.177.

keep basis in a state that has ordered bill and keep, it must offer to exchange all section 251(b)(5) traffic on a bill and keep basis.

Id. (emphasis in original) (internal footnotes omitted). We read the FCC's mirroring rule in the Order on Remand in conjunction with the Department's Orders to require that, in interconnection agreements re-negotiated during the interim period, if Verizon wishes to continue to exchange ISP-bound traffic on the terms which the Department has ordered in the D.T.E. 97-116-C Order, Verizon must offer to exchange all traffic subject to reciprocal compensation on what is, for all practical purposes, a bill and keep basis.

Lastly, the FCC makes clear in the Order on Remand that, after the effective date of the Order on Remand, when a new carrier enters the market or when an existing carrier expands into a market it has previously not served, carriers must exchange ISP-bound traffic (which the FCC defines as traffic above a 3:1 terminating to originating ratio, subject to rebuttal) on a bill and keep basis during the FCC's interim period. Order on Remand at ¶ 81. This "expansion" provision is the one area in which the Department's D.T.E. 97-116-C Order is preempted during the FCC's interim period.



IV. ORDER

After due notice and consideration, it is hereby

ORDERED: That the parties shall comply with all directives contained herein.

By Order of the Department,

\_\_\_\_\_/s/\_\_\_\_\_  
James Connelly, Chairman

\_\_\_\_\_/s/\_\_\_\_\_  
W. Robert Keating, Commissioner

\_\_\_\_\_/s/\_\_\_\_\_  
Paul B. Vasington, Commissioner

\_\_\_\_\_/s/\_\_\_\_\_  
Eugene J. Sullivan, Jr., Commissioner

\_\_\_\_\_/s/\_\_\_\_\_  
Deirdre K. Manning, Commissioner

Appeal of this Order shall be taken in accordance with applicable law. Timing of the filing of such an appeal is governed by the applicable rules of the appellate body to which the appeal is made.